IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
(MACON DIVISION)

CERTUSBANK, N.A., as successor by assignment to ATLANTIC SOUTHERN BANK, **Plaintiff,** **v.** **GENE DUNWODY, JR., et al.,** **Defendants.**	)	**CIVIL ACTION NO.** **5:14-cv-00069-LJA**

PLAINTIFF'S REPLY IN FURTHER SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiff CertusBank, N.A. (hereinafter "Plaintiff or "CertusBank"), as successor in interest to Atlantic Southern Bank, Local Rule 56, MDGa, hereby files this Reply in Further Support of its Motion for Summary Judgment (the "Motion") [Docket No. 28], stating as follows:[1]

A. The Bank Aff. conclusively establishes the amounts outstanding and due under the Loan Documents.

Contrary to Defendants' assertions, CertusBank provided sufficient and admissible evidence so as to make its *prima facie* case for the amount of money it is owed for principal, unpaid interest, fees, and costs based on the Affidavit of Ray Persenaire in Support of Summary Judgment [Docket No. 28-2] (the "Bank Aff."). *See F.D.I.C. v. P.C.F,* No. 1:13-CV-00801-JFK, 2014 WL 960923, at *7 (N.D. Ga. Mar. 11, 2014); *Federal Deposit Ins. Corp. v. Lee*, 2014 WL 241963, at *3 (M.D.Ga. January 22, 2014); *CertusBank, N.A. v. LAH, LLC*, 2013 WL 4009667, at *3 (M.D.Ga. August 5, 2013) (reliance on note, loan history and loan payoff statement

[1] Capitalized but undefined terms used herein shall have the meanings given to such terms in the Motion.

sufficiently established amount of the debt owed); *First Citizens Bank and Trust*, 2012 WL 779894, at *5 (affidavit of person with primary responsibility for loans in question "gave him knowledge of how [the lender] maintained its account records" and allowed him "to rely on the account summaries in calculating the amounts sought by plaintiff in its claims against defendants").

A court may only consider admissible evidence in ruling on a motion for summary judgment. *Wells Fargo Bank, N.A. v. SFPD II, LLC*, No. 1:11-CV-04001-JEC, 2013 WL 541410, at *4 (N.D. Ga. Feb. 12, 2013)(*citing* Fed. R. Civ. P. 56; *Mersch v. City of Dallas,* 207 F.3d 732, 734–35 (5th Cir.2000)). In order for the business records exception to the hearsay rule to apply, it must be shown that "(A) the record was made at or near the time [of the event] by ... [a person] with knowledge; (B) the record was kept in the course of a regularly conducted activity of the business ... [and that the] (C) making the record was a regular practice of that activity." Fed.R.Evid. 803(6). These conditions can be "shown by the testimony of the custodian or another qualified witness." *Id.*

In the Bank Aff., Mr. Persenaire relies on two sets of documents: the loan history statements and the payoff statements. For these documents to qualify under the business records exception, Persenaire must be a "custodian" or "qualified witness" under Rule 803(6) and must demonstrate that the documents meet the other requirements of the rule.

Mr. Persenaire is a Vice President of CertusBank and, in this capacity, maintained custody and control of the records produced in this suit. (Bank Aff. [28-2] at ¶¶ 3 and 5.) He also attests, under oath, that the records attached were made and prepared in the regular course of business by the bank, that they were made at or near the times of the transactions, and that they were made and prepared by individuals with knowledge of the transactions. (*Id.* at ¶ 60.) On its face, the affidavit therefore properly authenticates the records being relied upon and, thus, qualifies them for admission under the business records exception. *See Wells Fargo,* 2013 WL 541410, at *4. Furthermore, Defendants fail to point to any evidence that calls into question the trustworthiness of the documents. *See* Fed.R.Evid. 803(6)(E).

Defendants' argument that the attachments constitute inadmissible summaries also fails. Under Rule 1006 a party "may use a summary, chart, or calculation to prove the content of voluminous writings [ ] that cannot be conveniently examined in court." Fed.R.Evid. 1006. Here, the defendants simply offer their self-characterization of the attached documents as summaries, and, from that premise, seemingly argue that the plaintiff has failed to invoke Rule 1006 or to satisfy the Rule's requirements. The documents provided by CertusBank, however, are not summaries of voluminous records, but are the records themselves. The loan history statements are computer printouts detailing each disbursement and payment, beginning on the date of the loans and continuing through May 8, 2012 for Note 1, and August 27, 2012 for Note 2. The payoff statements similarly provide a recitation of data concerning charges outstanding under the loan documents, including late charges, appraisal charges, and property charges posted. For these reasons, "the documents are business records, admissible under Rule 803(6), and not summaries under Rule 1006." *See Wells Fargo*, 2013 WL 541410, at *4.

Defendants' arguments concerning reliability of the bank's calculations of principal based upon the loan history reports and payoff statements Notes 1 and 2 similarly fail. There is no issue of fact concerning the amount of principal owed. Defendant and Borrower Capricorn Centre, LLC through its 30(B)(6) designee Defendant Dunwody, Jr., admitted at deposition that Capricorn had no reason to believe that the amount of principal asserted under the Notes as outstanding by the bank leading up to this lawsuit were incorrect (aside from what he believed was the possibility of a $50,000 credit that was to be applied — which is *not* asserted as a defense to the amounts owed by the Defendants in their Response to the Motion):

> Q Okay. In these two letters there are amounts that are asserted as outstanding as of the date of each letter under the two notes --
>
> A Right.
>
> Q -- that you have testified to.
>
> Do you have any reason to believe, that as of the date of these letters, that these amounts that are asserted here are incorrect?
>
> A No, with the exception of the $50,000 that we paid Mike Wing during that time, that some of that accrued interest was paid on these notes.

Depo. Tr., Eugene Cox Dunwody, Jr., 10/30/14 at 17:14-24, and at Exs. 21-22. Defendants' reference to "zero" balances of principal recited in the loan history statements are nothing more than self-serving interpretations of the data presented, which conflict with Capricorn Centre, LLC's own testimony, and the loan history and payoff statements themselves. The purported "zero" balances are obviously data placeholders. The entries containing such placeholders show data other than the running principal balance, such as late charges, payments, and other account activity. The principal totals contained in the loan history statements are entirely consistent with Mr. Persenaire's affidavit testimony and the payoff statements, as well as the undisputed testimony of the Borrower.

Moreover, there is no issue of fact concerning the amount of interest outstanding under the Notes. The outstanding accrued interest totals recited in the Bank Aff. were cross checked for accuracy against the bank's records by Mr. Persenaire, as a bank officer with custody and control over the records. *See* Bank Aff. at ¶¶ 52 and 53. The bank's data and business records are thus both reliable and admissible. CertusBank is entitled to summary judgment for the full amounts requested in the Motion.

B. CertusBank is Entitled to Contractual Attorneys' Fees from Defendants Pursuant to the Note and Guaranties, and O.C.G.A. § 13-1-11.

CertusBank's demand letters are not defective with regard to the bank's statutory demand for attorneys' fees. While Defendants correctly point out that the Demand Letters (attached as Exs. I and R to the Complaint) refer to the provisions of the Notes, Section 7 of each of the Notes expressly provides that, "This Note is further governed by the Commercial Loan Agreement executed between [CDS] and [Atlantic Southern] as part of this Loan, as modified, amended, or supplemented." The Loan Agreements in turn provide, *inter alia*, that, if Capricorn's indebtedness thereunder "is collected by or through an attorney after maturity, [Capricorn] agree[s] to pay 15 percent of the Principal and interest owing as attorneys' fees.". Complaint, Exs. A, at § 9, and K, at § 10.

CertusBank therefore gave notice and made demand in accordance with the applicable version of O.C.G.A. §13-1-11, and is entitled to attorneys' fees at 15% of the principal and interest owing as provided under the Loan Agreements. These amounts are accordingly included in the amounts requested in Plaintiff's Motion for Summary Judgment. Specifically, $28,691.29 remains owing for statutory attorneys' fees under Note 1; the $142,411.28 in statutory attorneys' fees under Note 2 was satisfied with application of foreclosure proceeds. *See* Plaintiff's Statement at ¶¶ 23 and 48.

Defendants further contend, without basis, that there is "…no evidence presented that the notice was received by Defendants." *See* Defendants' Joint Responsive Brief at p. 7 [Docket No. 35]. Each Defendant testified during deposition that the demand letters were actually received, or at the very least that they had no reason to dispute service of the letters as addressed. *See* Depo. Tr., Eugene Cox Dunwody, Jr., 10/30/14 at 16:16 to 17:13 and at Exs. 21-22.; Depo. Tr., Jack W. Jenkins, 8:7-17, and 9:14-22 and at Exs. 21-22; Depo. Tr., Eugene Cox Dunwody [Sr.], 10/30/14 at 8:22 to 10:7 and at Exs. 21-22; Depo. Tr., William T. Long, Sr., 10/30/14 at 14:10 to 15:25 and at Exs. 21-22.

Even if Defendants did not receive service of the letters (which they did), each Defendant was nevertheless served with the Complaint in this case which had the letters attached as Exs. I and R, respectively. Service of the Complaint also serves as proper statutory notice of the demand for attorneys' fees under O.C.G.A. §13-1-11. *See, e.g., Associates Commercial Corp. v. Storey*, 192 Ga. App. 199, 384 S.E.2d 265 (1989)(demand for attorneys fees under O.C.G.A. § 13-1-11 made pursuant to complaint).

C. Defendants' Waivers of the Confirmation Statute, O.C.G.A. § 44-14-161, are Enforceable Under Georgia Law

Defendant's defenses based upon on Georgia's anti-deficiency confirmation statute (O.C.G.A. § 44-14-161) fail because in each of the Guaranties, Defendants expressly waived, among other things, "reliance on any anti-deficiency stautes, through subrogation or otherwise…" and agreed that "such statutes in no way affect or impair my liability." *See* Guaranties at § 9(A)(9), Complaint, D, E, F, G, M, N, O, and P. This waiver is enforceable under Georgia law. *See Cmty. & S. Bank v. DCB Investments, LLC,* 760 S.E.2d 210, 216 (Ga. Ct. App. 2014), *reconsideration denied* (July 29, 2014)(where guarantors waived defense based on failure to obtain a valid confirmation of the foreclosure sale, lender was entitled to collect difference between amount due on note and the foreclosure sale proceeds from guarantors). Since Defendants expressly waived, among other things, all defenses arising under any anti-deficiency statutes such as O.C.G.A. § 44-14-161 in their Guaranties, Certus is entitled to recover the remaining outstanding debt under the Notes. *See Cmty. & S. Bank,* 760 S.E.2d at 216.

Contrary to Defendants' assertions, this Court has specifically upheld and enforced identical waiver language against guarantors based upon *Cmty. & S. Bank,* the case of *HWA Props., Inc. v. Cmty. & S. Bank,* 322 Ga.App. 877, 885–88, 746 S.E.2d 609, 616–17 (2013), and applicable Georgia law:

> Though the Plaintiff cannot recover a deficiency judgment on Note 2 from JSD, the waivers contained in the guaranties preclude the Defendants' argument. The guaranties contain general language that the Guarantors "waive defenses that may be available based on ... the status of a party to the Debt or this Guaranty" and specific waiver provisions, including subsection (9): "I agree to waive reliance on any antideficiency statutes, through subrogation or otherwise, and such statutes in no way affect or impair my liability." (Docs. 10–2 at 3; 10–3 at 3; 10–6 at 3). Further, Section 4 of the guaranties provides that the Guarantors are unconditionally liable even if the debt becomes unenforceable against the borrower or if the borrower "has such obligation discharged in bankruptcy, *foreclosure,* or otherwise discharged by law." (Docs. 10–2 at 2; 10–3 at 2; 10–6 at 2) (emphasis added).[7] The Georgia Court of Appeals has upheld similar waivers. *See Cmty. & S. Bank v. DCB Invs., LLC,* 760 S.E.2d 210, 214–17 (Ga.App.2014); *HWA Props., Inc. v. Cmty. & S. Bank,* 322 Ga.App. 877, 885–88, 746 S.E.2d 609, 616–17 (2013).

CertusBank, NA v. JSD--S. Land Res., LLC, No. 5:13-CV-418 MTT, 2014 WL 5668173, at *4 (M.D. Ga. Nov. 4, 2014). *JSD* is indistinguishable from the present case insofar as CertusBank was denied confirmation of the applicable foreclosure sale in *JSD* by the state Superior Court prior to seeking redress under its guaranties in a subsequent deficiency suit. *See JSD*, 2014 WL 5668173, at *1 ("The Plaintiff sold the Note 2 security deed property, a tract of land in Monroe County, Georgia, for $351,750.00… The Plaintiff did not obtain confirmation of the Note 2 foreclosure sale.").

The sequence of events in the instant case was no different than in *JSD*—CertusBank foreclosed its collateral, was denied confirmation, and then sued upon the Defendants' Guaranties in reliance upon the clear and unequivocal waivers contained in the Guaranties. Defendants' analysis on this point is therefore flawed and amounts to nothing more than incorrect reading of the *JSD* case. As in *JSD,* Georgia law requires that this Court enforce these identical waiver provisions.

Defendants' various policy arguments and jurisdictional theories are likewise irrelevant and contradict controlling Georgia caselaw on the issue. It has long been settled that in Georgia law that, "A guarantor may consent in advance to a course of conduct which would otherwise result in his discharge, and this includes the waiver of defenses otherwise available to a guarantor." *Baby Days v. Bank of Adairsville,* 218 Ga.App. 752, 755(3), 463 S.E.2d 171 (1995) (Citation omitted.) The Guarantors expressly waived the confirmation statute in advance, and CertusBank is entitled to summary judgment accordingly.

D. Defendants' Guaranties are not Unconscionable.

CertusBank seeks no more than it is entitled to under the express language of the Guaranties, as agreed to by Defendants. The Defendants' Guaranties are not unconscionable as alleged. Georgia applies a two-pronged analysis to determine whether a contract is unconscionable. A contract (or contract provision) is unconscionable if it is both procedurally and substantively unconscionable. *NEC Technologies v. Nelson,* 267 Ga. 390, 478 S.E.2d 769, 771–72 (1996).

"Procedural unconscionability addresses the process of making the contract," and includes elements such as "the age, education, intelligence, business acumen and experience of the parties, their relative bargaining power, the conspicuousness of and comprehensibility of the contract language, the oppressiveness of the terms, and the presence or absence of a meaningful choice." *NEC Technologies,* 478 S.E.2d at 771–72. Substantive unconscionability "looks to the contract terms themselves," and focuses on matters "such as the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and similar public policy concerns." *Id.* at 772.

The loan transactions at issue involved arms-length commercial loans slated for redevelopment of downtown Macon. *See* Depo. Tr. of G. Dunwody, 4:5-17. There is nothing unique about these particular Defendants' execution of their respective Guaranties, or their express contractual commitment to pay a limited amount of principal plus all accrued interest and statutory attorneys' fees calculated upon the total accrued obligations of the Borrower, Capricorn Centre, LLC. They certainly could have guaranteed the entirety of the obligations instead, and this would not be unconscionable.

As a general matter, Guaranties of payment are enforceable under Georgia law so there are no public policy concerns here. *See Caves v. Columbus Bank & Trust Co.*, 264 Ga. App. 107, 110-11, 589 S.E.2d 670, 673 (2003) (creditor established liability under a personal guaranty where the guarantor admitted execution of a guaranty and the creditor established the underlying indebtedness). The Guaranties involved customary and legally permissible guarantees of debt. Defendants' defense of unconscionability as to their Guaranties thus fails and CertusBank is entitled to summary judgment for the amounts sought.

WHEREFORE, Plaintiff respectfully requests that the Court (i) grant the Motion and enter summary judgment in favor of Plaintiff and against Defendants, jointly and severally, in the amounts demanded in the Plaintiff's Motion and Memorandum in Support; and (ii) grant such other and further relief to Plaintiff as the Court deems just and appropriate.

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Dated: February 9, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that that on February 9, 2015 I electronically filed the foregoing *Plaintiff's Reply in Further Support of Motion for Summary Judgment* with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorney(s) of record.

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